CITATION:	*Miles v Northern Territory of Australia* [2005] NTMC 058
PARTIES:	BRETT VERNON MILES
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	Crimes (Victims Assistance) Act (NT)
FILE NO(s):	20324681
DELIVERED ON:	7 September 2005
DELIVERED AT:	DARWIN
HEARING DATE(s):	1 September 2005
JUDGMENT OF:	A/JR Day

CATCHWORDS:

Crimes (Victims Assistance) Act s.12(c); failure to assist police in investigation of offence – meaning of 'assist'; assessment of damages

REPRESENTATION:

Counsel:

Applicant:	J. Truman
Respondent:	M. Garraway

Solicitors:

Applicant:	Halfpennys
Respondent:	De Silva Hebron

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 058
Number of paragraphs:	32

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No: 20324681

BETWEEN:

BRETT VERNON MILES
Applicant

AND:

THE NORTHERN TERRITORY OF AUSTRALIA
Respondent

REASONS FOR JUDGMENT

(Delivered 7 September 2005)

ACTING JUDICIAL REGISTRAR DAY:

The Offence

1. By application filed 12 November 2003 the applicant seeks an order for an assistance certificate pursuant to s.5 of the *Crimes (Victims Assistance) Act* (NT) ('the Act'). The applicant alleges that he was the victim of an offence, namely assault, committed against him by persons unknown at Alice Springs Correctional Centre on 28 November 2002 and that he has suffered an injury as a result of that offence. No person has been identified or prosecuted in relation to the alleged offence.

2. On 28 November 2002 the applicant was an inmate at the Alice Springs Correctional Centre. His evidence is that on that day he remembers leaving his cell to go to work at the prison and then waking up two days later in the Alice Springs Hospital. The applicant's medical notes (annexure 'BVM1' to the affidavit of the applicant sworn 13 May 2004) and in particular the report of J. Wearne (described as an 'E.D. Consultant') dated 29 November

2002 confirm that the applicant was admitted to hospital with injuries consisted with an assault. Wearne's report states that the applicant was conscious on admission, that various investigations including x-ray and CT Scan were done during his hospital stay and that the applicant was discharge from hospital 'today' which can only be the day of the report namely 29 November 2002. A nurses' review summary from Alice Springs Corrections Medical Services confirms that the applicant returned to the prison from the hospital on 29 November 2002.

3. Also annexed to the affidavit of the applicant of 13 May 2004 are a bundle of documents identified as annexure 'BMV8' which comprise reports of a number of prison officers in relation to the incident. Each of these officers' reports is essentially to the same effect, namely that the officer involved attended at a dormitory at the Alice Springs Goal where they saw the applicant suffering from various injures.

4. On the basis of the evidence referred to above, which is uncontradicted, I find that the applicant was the victim of an offence, namely assault contrary to s.188 of the *Criminal Code Act* (NT), which assault occurred on 28 November 2002 at Alice Springs Correctional Centre.

The Injuries

5. There is evidence which supports a finding that the applicant was injured as a result of the assault. In relation to the injuries the evidence is that of the respondent and the various medical experts upon whose opinions he relies. The respondent does not seek to rely upon any alternative medical reports and therefore the applicant's experts' reports are unchallenged.

6. The applicant lists his injuries at paragraph 3 of his affidavit of 13 May 2004. Some of these injuries are confirmed in the report of Wearne referred to above. They were described by Wearne as "blunt trauma to his face, head right shoulder and chest." Photographs forming part of annexure BVM1 to

the applicant's affidavit of 13 May 2004 are photocopies and difficult to make out clearly but appear to show bruising to the face and back of the head. A diagram attached to the medical notes is to similar effect. The injuries the applicant claims to his right elbow and thumb are noted in the ambulance report and briefly in the Alice Springs Hospital notes annexed to the affidavit of Matthew Charles Garraway sworn 12 August 2004 but are not the subject of any expert evidence in this case.

7. The applicant's evidence is that after the assault he had persistent headaches for about 3 months. He says that he still gets occasional headaches.

8. Wearne's report states that the applicant lost consciousness as a result of the assault and that he suffered from retrograde amnesia. The applicant says that he has no memory of the assault itself, and that continues to this day. In addition the applicant's evidence is that after the assault his memory was poor, he felt like he could not concentrate very well, felt like he was "drunk all the time" and felt "vague".

9. The applicant also claims to have suffered from mental distress and a mental injury as a result of the assault. His evidence is that he initially suffered anger and depression including thoughts of self-harm and harming others. Other symptoms described by the applicant include sleeplessness, insomnia, loss of appetite (during the initial period only), feelings of sadness and anger, fear ('feeling jumpy'), fear of Aboriginal people, and depression.

10. The applicant states in his evidence that he was prescribed antidepressant medication in prison and that he took this medication until July 2003. As at 13 May 2004 the applicant was taking other medication which he says is a mood stabiliser called 'Epilim' and which he had been taking for 12 months.

11. The applicant relies upon a report from Dr. Lester Walton, psychiatrist, dated 15 July 2003. Dr. Walton diagnosed the applicant as suffering a reactive depressive disorder (adjustment disorder) which in the doctor's

opinion was a direct result of the assault. Dr. Walton also considered the likelihood of subtle persisting intellectual impairment as a result of the closed head injury however I do not interpret his comments in this regard as a concluded finding on his part. This part of the evidence was dealt with by Mr. Reid as set out below.

12. Dr. Walton recommends weekly psychological counselling for six months and estimates the cost at between $75 and $150 per week. The applicant gave evidence that he would undergo such counselling and I would accept that evidence. For the purposes of calculation I would adopt a give of $100 per week for 26 weeks, a total of $2,600. I note that the per session figure may be greater than $100 but also note that the number of weeks counselling required may be less than 26 based upon the report of Mr. Reid referred to below.

13. As for the future Dr. Walton expected some long-term residual symptoms at less than the intensity he had observed at the date of his examination. The applicant's ongoing cognitive impairment was described by Dr. Walton as of "quite minor proportions" and he pointed out that the applicant was able to successfully study whilst in prison. Dr. Walton did not believe that the applicant's capacity for work was seriously compromised as a result of his mental injury.

14. The applicant also relies upon the report of Mr. Mark Reid, neuropsychologist, dated 13 April 2004. The history recorded by Mr. Reid is similar to that recounted by Dr Walton although there are some discrepancies. Mr. Reid carried out neuropsychological testing of the applicant. His findings were of mild or subtle difficulties consistent with primary brain injury. He describes these in the following terms:

> "They include some difficulty with the effective retrieval or recall of learned information and there are also some indications of some subtle difficulties with the effective processing of more complex information."

It is Mr. Reid's opinion that this mild deficit will not worsen and may improve over six months following the date of his report. Importantly, the deficit will not constitute any major difficulty in the applicant's day to day life, although it may make tertiary studies more difficult. Mr. Reid assesses the degree of permanent impairment at 7% of the whole person as a result of this injury, based upon the American Medical Associate Guides to the Evaluation of Permanent Impairment, 4th edition.

15. The applicant deposes further to his injuries in his affidavit of 6 June 2005. In this affidavit the applicant refers to ongoing right shoulder pain which he says results from the assault. In relation to the right shoulder injury the applicant relies upon a report of Mr. Cameron Croker, physiotherapist, dated 10 August 2004 and two reports from Prof. Vernon Marshall dated 10 December 2004 and 3 May 2005.

16. Mr. Croker's report records that the applicant reported to him that he had only suffered minor pain when exercising the shoulder subsequent to the assault until about mid 2004 when there was an increase in pain symptoms. Mr. Croker recommended further investigation by an orthopaedic specialist.

17. Professor Marshall, surgeon, noted in his report of 10 December 2004 the applicant's ongoing symptoms as minor chest pain lower left chest and persisting neck and shoulder pain, particularly of the right shoulder. The provisional diagnosis was bilateral rotator cuff tendonitis, subject to radiological imaging. The radiological investigations were done and Prof. Marshall reports on these in his report of 3 May 2005. His diagnosis is degenerative change of the lower cervical and upper thoracic region with stenoses of the nerve root foramina at C5/6 and C6/7, particularly on the right. The MRI imaging showed no rotator cuff injury but a tearing of the capsule of the shoulder joint on the left and mild degenerative change in the rotator cuff tendon on the right.

18. In his report of 3 May 2005 Prof. Marshall finds that as a result of the cervical spine disorder the applicant has an 8% whole person impairment, based upon the AMA Guide (referred to above). There is insufficient evidence upon which to base a finding that any disability related to the applicant's cervical spine was caused or contributed to by the assault. The applicant does not mention neck pain or injury to his neck in any of his affidavits. Dr. Marshall does not give an opinion as to whether the neck pain is connected to the assault. Therefore I would exclude any current disability related to the applicant's cervical spine from the assessment of damages.

19. Similarly in relation to the left shoulder injury, there is no evidence that there was any injury to the applicants left shoulder as a result of the assault. Again, the applicant does not mention it in his evidence and Dr. Marshall does not state that the current difficulties with the left shoulder were caused by or materially contributed to by any injury suffered by the applicant in the assault. In the circumstances I would also disregard any disability of the left shoulder for the purposes of assessing damages.

20. Prof. Marshall's evidence is that the applicant's right shoulder impairment equates to a 6% impairment of the right arm, based upon the AMA Guides. Whilst recording the applicant's complaints of pain in the shoulder, however, Prof. Marshall does not make any statement linking the right shoulder pain or the findings on radiological imaging with the assault. Combining this fact with the evidence of Mr. Croker that the applicant told him that he had had no serious problems with shoulder pain until mid 2004, some 18 months after the assault, I have come to the view that the applicant has failed on the balance of probabilities to prove that the current disability of the right shoulder is related to the assault.

21. Taking into account all of the above, if the applicant were entitled to the issue of an assistance certificate I would assess damages in accordance with

the Act in the sum of $8,000 in respect of the heads of damage allowed in sections 9(2)(e), (f) and (g) of the Act. In addition I would allow an amount of $2,600 in respect of future medical expenses under s.9(2)(d), giving a total of $10,600. However this is not the end of the matter for reasons which appear below.

Failure to assist police

22. The respondent argues that the applicant should be disentitled from an order for an assistance certificate by reason of s.12(c) of the Act. That section provides:

> "The Court shall not issue an assistance certificate –
>
> …
>
> (c) where an applicant or victim has failed to assist the Police Force in the investigation or prosecution of the offence;…".

23. As to the effect of s.12(c), I respectfully adopt the summary of the law given by Ms. Blokland SM in *Tirak v. Northern Territory of Australia & Ors* [2002] NTMC, Unreported 11 September 2002 where she said at paragraph 4:

> "The principles revealed in those authorities are first, that an applicant need not take a proactive role; secondly, the applicant's role is contemplated as being secondary to the role of police in the sense of providing assistance when requested to do so; thirdly, the onus of proof is on the respondent to show that an applicant has failed to assist in the sense of the section. This is all within the context of a remedial Act which should be construed liberally, save for excepting provisions which do not necessarily attract a liberal interpretation: (*Woodruffe v The Northern Territory of Australia* (2000) 10 NTLR 52, citing *Rose v Secretary, Department of Social Security* (1990) 92 ALR 521)."

24. I accept the evidence of the applicant that he did not know at the time and does not now know who it was that assaulted him. There are in the various affidavits a few matters which may at one stage have been sought to have

been relied upon by the respondent to paint the applicant as generally uncooperative regarding the investigation of this matter. At the hearing however there was, in my view correctly, only one allegation of substance in relation to the alleged failure to assist namely the failure by the applicant to pass on to the police certain rumours which he heard whilst in prison.

25. The essential facts may be shortly summarised. The applicant initially reported the matter to police (via the prison authorities) but it was not proceeded with, for reasons which were disputed. I do not find any failure to assist on the part of the applicant in relation to the initial investigation. In about August of 2003 however the applicant, through his solicitor, caused the police to re-open the investigation and as a result on 1 October 2003 Detective Huysse attended Berrimah Correctional Centre where the applicant was then incarcerated. Detective Huysse had a conversation with the applicant at the prison. The conversation is deposed to in Detective Huysse's affidavit sworn 12 August 2005. Both Detective Huysse and the applicant agree that the police officer asked the applicant if he could remember who assaulted him and he said that he could not.

26. Detective Huysse's evidence is that he then asked the applicant whether there was anything else that he wanted to tell him about the assault. The applicant has sworn an affidavit (25 August 2005) in response to the affidavit of Detective Huysse. In that affidavit the applicant does not deny that Detective Huysse asked him the second, very general, question. I find that this second question was in the nature of an invitation or request by the police to the applicant to provide any further information whatsoever that he may have had in relation to the matter. I find that this amounted to a request for assistance.

27. The applicant admits in his affidavit of 25 August 2005 that at the time of his conversation with Detective Huysse he knew of two different rumours which had been circulating in Alice Springs Goal about who his assailants

may have been. The first rumour was that the applicant was assaulted by a group of Aboriginal offenders, the second that he was assaulted by a group of other prisoners who 'took offence' when the applicant refused to become involved in some unidentified criminal activity. No particular individuals were identified to the applicant.

28. The applicant said that he did not pass on the rumours to Detective Huysse because it was very poor quality information. He says at paragraph 12 of his affidavit of 25 August 2005

> "I never had the group of aboriginals identified to me, nor did I have these people who had tried to allegedly get me involved in further criminal offences identified to me. There are always rumours swirling in the prison as to who is doing what to whom. I didn't know what was true and I certainly wasn't prepared to tell Detective Huysse of rumours only, when I had no other information whatsoever to identify these people to him or any proof of the rumours let alone someone who would corroborate the rumours being said."

29. In my opinion the failure by the applicant to pass on the rumours does amount to a failure to assist in the circumstances. It is not for the applicant to decide which information may be probative in terms of a police investigation. An applicant is not to know what other information police might have which, when added to the applicant's rumours, might lead to a useful line of inquiry. It must often be the case that in the course of investigation information which is only rumour comes into the hands of police and, although such information is often worthless, sometimes it may be important. Further, in this particular case it is clear that the applicant thought that the rumours were sufficiently important to pass them on to Dr. Walton in July 2003 and Mr. Reid in April 2004. Clearly then the fact of the rumours and their gist (not their truth) was a piece of information which the applicant had and which he could have passed onto the police in order to assist the investigation. He deliberately chose not to.

30. The applicant states that the conversation with Detective Huysse took place in the general prison yard with other prisoners looking on and that he didn't want to "make bald face allegations" in that context. The applicant deposes that he expected trouble just for being seen talking to the police. I am of the view that this circumstance does not provide any excuse for the applicant. There is no exculpatory provision in s.12(c), rather the section is exclusionary in nature. Therefore any reason which the applicant may have had for failing to assist the police, even fear for his own safety, cannot provide an excuse once it is found that a request for assistance has been made and that the applicant has failed or refused to comply.

31. Further the applicant says that Detective Huysse appeared "entirely disinterested", even annoyed, particularly after the applicant asked that part of a written statement alleging a previous withdrawal of the complaint be altered. The only relevance of this evidence, if it is accepted, could be to call into question whether the police officer actually made a genuine request for assistance from the applicant. I am not satisfied on the basis of this statement by the applicant that the invitation by Detective Huysse was not a genuine request to provide assistance. The police were attending at the prison for the specific purpose of taking a statement from the applicant. They were there at the request of the applicant, on his own evidence. Therefore it seems to me quite disingenuous for the applicant to say that he was not aware that he should provide all information which he had in relation to the matter, including the rumours.

32. Accordingly I find that the applicant has failed to assist the police with the investigation of the offence committed against him and accordingly his application for an assistance certificate must be dismissed. I make the following orders:

    a. The application for an assistance certificate is dismissed.

    b. Liberty to the respondent to apply on the question of costs.

Dated this 7th day of September 2005

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MEREDITH DAY
A/JUDICIAL REGISTRAR